


BOARD OF COUNTY COMMISSIONERS

INTER-OFFICE MEMORANDUM

To: Honorable Chairman and Members of the Board of County Commissioners
Parwez Alam, County Administrator
Gary Johnson, Director of the Office of Growth & Environmental Management
Tony Park, Director of Public Works

From: Herbert W.A. Thiele, Esq.
County Attorney's Office 

Date: February 5, 2004

Subject: Additional Materials for Add-on Agenda Item: "Update on the Potential Purchase and Development of FallsChase by Heritage Development Company of Moreland Hills, Ohio"

Pursuant to a request from Commissioner Rackleff, enclosed is the following additional material for the above-referenced add-on agenda item:

- 1) February 25, 2003, Agenda Item on "Determination of 'Vested Rights' for FallsChase Development of Regional Impact," and,
- 2) Copy of Opinion in *Monroe County v. Ambrose*, 3d DCA Cases.

If you have any questions, please contact the County Attorney's Office.

HWAT:sl

Enclosures


Board of County Commissioners

Agenda Request

Date of Meeting: February 25, 2003

Date Submitted: February 20, 2003

To: Honorable Chairman and Members of the Board of County Commissioners

From: Herbert W.A. Thiele, Esq. 
County Attorney

Subject: Determination of "Vested Rights" for FallsChase Development of Regional Impact

STATEMENT OF ISSUE:

Determination of whether or not the FallsChase Development of Regional Impact ("DRI") is exempt from the current Leon County Land Development Regulations (but still "vested" for consistency and concurrency purposes).

BACKGROUND:

The FallsChase DRI includes approximately 624 acres located along Buck Lake Road. The project includes frontage on Mahan Drive (U.S. 90) and on Lake Lafayette. In 1973, the FallsChase DRI received approval from the Board of County Commissioners as a DRI by a resolution approving the Northwest Florida Regional Planning Agency's Report on the proposed development. Also in 1973, the Board approved a Planned Unit Development ("PUD"), rezoning the FallsChase property to provide for implementation of the approved DRI. The approved PUD included the development of 2,572 dwelling units, 425,000 square feet of office space on approximately 29 acres, and approximately 25 acres of commercial land use.

On January 14, 1975, the Board approved, by adoption of a local ordinance, the establishment of the FallsChase Special Taxing District to provide the development with certain mechanisms to finance infrastructure improvements. On April 9, 1979, Leon County Public Works, Division of Environmental Services, issued Clearing and Development Permit # 852, allowing the construction of some of the FallsChase infrastructure, including the existing roadway within the DRI. Over the next several years, the FallsChase Special Taxing District financed the building of roads and the installation of water and sewer infrastructure on a portion of the property to support the initial development phase.

On September 18, 1980, the Tallahassee-Leon County Planning Commission approved a preliminary plat for 155 lots, constituting Phase I-A within the FallsChase Development PUD. This preliminary plat approval encompassed approximately 73 acres. This preliminary plat predated the existing site plan process currently required for subdividing land.

The Board accepted a final plat for recording by the Clerk for a portion of the area covered by the 1980 preliminary plat on August 17, 1984. This recorded 33-lot plat totaled approximately 48 acres, and is recorded in Plat Book 9, Page 40, Leon County Public Records.

On February 4, 1998, after full site plan review, a 144-lot site plan was approved. The approved site plan showed a reconfiguration of the lots that achieved compliance with the County's Environmental Management Act, governing development on severe slopes and development below the 51-foot contour line. The Leon County Department of Growth and Environmental Management issued permit number LEM 97000222 on April 9, 1998, to construct the infrastructure required by the approved site plan. However, no construction associated with this permit commenced and the permit subsequently expired three years after issuance.

Subsequent to the adoption of the County's 2010 Comprehensive Plan in 1990, the owner of FallsChase requested a vested rights determination for the proposed development, pursuant to the provisions of the County's Vested Rights Review Ordinance. In October of 1991, County staff issued a Certificate of Vested Rights (VR0167LC) for the PUD, consistent with the development approvals that had been received previously through the DRI and PUD processes. This Comprehensive Plan vesting, for purposes of Comprehensive Plan consistency and concurrency management compliance, remains valid based on the PUD approved Chapter 380.06, Florida Statutes; the DRI Development Order, and the accompanying PUD zoning. The vesting certificate states that "a final PUD must be filed and approved for subsequent phases and all development must meet the Environmental Management Act and land development regulations in place at that time."

On October 14, 1997, the Board approved the conversion of the FallsChase Special Taxing District to the FallsChase Community Development District ("CDC") consistent with the enabling legislation and attendant regulatory provisions provided in Chapter 190, Florida Statutes. The Florida Department of Community Affairs monitors all CDCs that are established through the provisions of Chapter 190, Florida Statutes. Through the CDC, FallsChase has the mechanisms to collect special property assessments to finance improvements for the benefit of the District. Other CDCs in the County proper include the Southwood and Piney Z developments, both of which are located in the jurisdiction of the City of Tallahassee.

On November 19, 2002, the Board approved a replat of the 1980 recorded plat of FallsChase Units 1A and 1B. Unit 1A was approved as West Village-Unit 1A, less lots D-7 and H-6, for a total of 83 lots, and West Village-Unit 1B was approved for 34 lots. Both approvals were given

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on the basis that the plat constituted a replat of lots approved under subdivision approval processes in 1980 and that the boundary of said replat already contained the infrastructure required in 1980 to serve the development. The Board noted that its approval did not constitute a waiver by Leon County of its position that the remainder of the FallsChase DRI must fully comply with all existing regulations, ordinances of the County, and statutes in effect at the time of any further development order or development permit applications within the FallsChase DRI boundaries. To date, development of the property has included a roadway system and utilities (water, sewer and electric) to serve approximately 70 acres of the project. However, only four (4) single family homes have been built on the 33 lots platted in 1980.

Further detailed plans for the remaining 554 acres of FallsChase have not been provided to the County to date, other than a conceptual master plan that was submitted to staff on May 23, 2002, as a proposed development agreement with the County. Staff's preliminary review of this proposal and responses to the applicant's agent are discussed in the Analysis section.

It has been the position of the County Attorney's Office, as stated in numerous previous agenda items, that the FallsChase DRI is vested only from the consistency and concurrency provisions of the Comprehensive Plan by virtue of the vesting certificate issued in October of 1991. As you are aware, a land use attorney hired by FallsChase has previously issued a contrary opinion on the vesting issue. That opinion has apparently previously been distributed to the Board. The legal analysis presented in this agenda item was produced by the County Attorney's Office with assistance from the statewide law firm of Holland & Knight, P.A. In addition, County staff has conducted extensive research and compiled an exhaustive chronology of the history of FallsChase approvals, which is available from either the County Attorney's Office or Community Development for your review.

ANALYSIS:

Vested Rights

For purposes of the FallsChase DRI project, there are two bases on which an exemption from regulations may be acquired. Vested rights may be acquired by statute or as a result of the application of common law principles of equitable estoppel. FallsChase has claimed that both the concepts are applicable to the project.

Statutory

The statutory basis for the claim that a project has "vested rights" is section 163.3167(8), Florida Statutes. That section provides as follows:

- (8) Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to Chapter 380

or who has been issued a final local development order and development has commenced and is continuing in good faith.

§163.3167(8), Florida Statutes.

Chapter 163 requires local governments to adopt a comprehensive plan and implementing land development regulations. It follows, then, that the "vested rights" that may be acquired pursuant to section 163.3167(8) would protect a development from having to comply with a subsequently adopted comprehensive plan or land development regulations that implement the comprehensive plan under appropriate circumstances. This provision has been interpreted in this fashion. *Edgewater Beach Owners' Association, Inc. v. Walton County, et al*, (Fla. 1st DCA, December 19, 2002).

It is clear that the Leon County Board of County Commissioners approved by resolution the Lake Lafayette Development, which is also known as FallsChase. This approval occurred on February 12, 1974. A development order, as the term is commonly understood today, was not issued. However, the approval did not contain an expiration date and it remains valid today. The resolution approved the report submitted by the Northwest Florida Regional Planning Agency on November 27, 1973 concerning the development, and supporting documents include the following:

1. Site condition analysis Lake Lafayette – Willard C. Byrd (Map);
2. Traffic flow analysis Lake Lafayette – Willard C. Byrd (Map);
3. Preliminary master plan Lake Lafayette (map) with depiction of FallsChase area encompassing upper Lake Lafayette on north and seven sides of lake. Indicated majority of conceptual plan is condominium development. Willard C. Byrd & Associates.
4. A concept plan submittal for a plan unit development – prepared by E. Lamar Bailey Associates and Willard C. Byrd & Associates, with legal description showing that the site comprises 623.53 acres; and
5. Development of Regional Impact for a planned unit development in Leon County, Florida, prepared by E. Lamar Bailey Associates with Willard C. Byrd Associates.

The documentation indicates that the density and intensities of the development were a maximum of 2,572 residential units, 425,000 square feet office, and 25.4 acres of commercial use, plus an additional 15,000 square feet aggregate of commercial use at 3 locations, containing no more than 5,000 square feet commercial at each location within the residential component.

On November 27, 1973, the Leon County Board of County Commissioners approved the FallsChase application for a PUD concept (planned community) zoning district by the adoption of Ordinance Number 73-64.

Preliminary plat approval from the Tallahassee-Leon County Planning Commission was granted on September 18, 1980 for Phase IA of the project. The preliminary plat consisted of 155 single family lots. The Leon County growth management department issued environmental permits for the construction of the infrastructure necessary to service the units. On August 14, 1994, the Leon County Board of County Commissioners approved a final plat for Phase I of the project and made a determination that the plat conformed with the preliminary plat approved on September 18, 1980 by the Tallahassee-Leon County Planning Commission.

On October 21, 1991, the Tallahassee-Leon County Planning Commission issued a certification of vested status indicating that the FallsChase project "is vested to develop per the PUD approved by the Leon County Board of County Commissioners on November 17, 1973." The certification goes on to state that "[a] final PUD must be filed and approved for subsequent phases and all development must meet the Environmental Management Act and land development regulations[sic] in place at that time." The densities are also stated in the certification.

The developer¹ has claimed in various pieces of correspondence, most recently an opinion dated September 24, 2002, from Thomas Pelham, Esq., to Tasha O. Buford, Esq., that the vesting pursuant to section 163.3167(8), Florida Statutes, precludes the application by Leon County of the Lake Lafayette Special Development Zone Ordinance (SDZ) that was adopted in 2002. Leon County Ord. No. 2002-12. That ordinance establishes special development zone standards for Lake Lafayette.

The Florida Department of Community Affairs (DCA), which is the agency currently charged with administering the state's growth management laws, has issued several declaratory statements concerning the applicability and the scope of section 163.3167(8) as it applies to developments. A representative description of the DCA's interpretation of that provision is as follows:

It is the Department's position that the intent of Subsection 163.3167(8), F.S., was to "grandfather" or "vest" a

¹ In various places throughout this agenda item, reference is made to the "developer". The original applicant was E. Lamar Bailey Associates. The current owner is Lafayette Hills, Inc. There exists an option to acquire the property in favor of FallsChase Joint Venture, LLC. This option evidently has not been exercised. See, Letter of February 9, 2003, from Charles Gardner, on behalf of Lafayette Hills, Inc. to Daniel J. Rigo, Assistant County Attorney. For ease of reference, the term "developer" will be used. However, the current ownership is relevant to claims relating to equitable estoppel and a further discussion is contained in that section.

developer's rights to complete this project as originally approved by the local government under its existing comprehensive plan and land development regulations. The prohibition against the modification or limitation of these development rights was directed specifically to local governments for consideration when they are establishing the needs of the community, drafting the revised comprehensive plan and implementing that plan through new land development regulations.

The provisions of Subsection 163.3167(8) prevent a local government from mandating requirements for new development regulations that would so change or alter a DRI development order that it would materially or substantially affect the developer's ability to complete the development authorized in the development order. This prohibition was specifically intended to protect the developer from the risk of planning and receiving approval for his proposed project under one set of regulations and then having to comply with a new set of different regulations before or during construction.

DRI development orders and final local orders establish specific development rights that must be recognized and respected by both the developer and the local government. Certain development rights that would be specifically protected by Subsection 163.3167(8) would include but not necessarily be limited to the following: authorized land use; density or intensity of development; staging or phasing of development; and other conditions of development or mitigation that are specific to each DRI development order issued.

General Development Corp. v. State Department of Community Affairs, 11 FALR 1032, 1037 (DCA 1998). See also, *Gulfstream Development Corp. v. Fla. Department of Community Affairs*, 11 FALR 1047 (DCA 1988). The DCA has further stated that:

[T]he exact extent to which . . . rights to complete its DRI are "vested" under section 163.3167(8), F.S., is dependent upon the terms and provisions of the DRI development order. Based upon the exact language in the . . . DRI development order, certain development rights may not be exempted from

compliance with the corresponding portions of the new comprehensive plan or land development regulations adopted thereunder.

American NewLand Associates v. State Department of Community Affairs, 11 FALR 5205, 5214 (DCA 1989).

Further, the Department issued an advisory opinion to the County interpreting these orders as they apply to the FallsChase DRI (Attachment #2). That opinion also concludes that the County may apply subsequently-adopted Land Development Regulations to the DRI to address health, safety, and welfare concerns.

In the case of the FallsChase project, there is an approved "development order" although it does not contain specific terms and conditions. Rather, the development order approved by the Leon County Board of County Commissioners was in the form of a resolution that referenced the report from the Northwest Florida Regional Planning Agency. It can be assumed, however, that the Application for Development Approval filed by the developer which formed the basis for the Regional Planning Agency report also form the basis for the resolution of the Leon County Board of County Commissioners.

Although the developer has indicated that the original PUD application contained a detailed plan of development for the project (*see* Pelham letter) this does not appear to be the case. Most of the documents that were submitted by the developer were either "conceptual" or "preliminary". In fact, it appears that the developer himself has acknowledged that the PUD/DRI approval did not include any specific plan of development that he would be required to follow and that the PUD ordinance permitted him to develop plans for different phases of the development so long as he stayed within the densities approved. (Attachment #3, Memorandum from Diana Sawaya-Crane to Mike Garretson, May 15, 1981 at page 3.)²

Based upon our review, and applying the principles set forth in the *Edgewater Beach Owners' Association, Inc. supra* and the cited DCA Declaratory Statements, it appears that the project is vested only for the densities and intensities to a maximum of 2572 residential units, 425,000 square feet office, and 25.4 acres of commercial use, plus an additional 15,000 square feet of aggregate commercial use at 3 locations, containing no more than 5,000 square feet commercial at each location within the residential component. Additionally, it appears that the plat approved

² The PUD ordinance specifying the requirements and procedures for review that was in effect at the time contemplates that a final development plan would be submitted, reviewed, and approved. *See* COT Ord. No. 73-1366, § 7.7. In fact, the final development plan is required to include a grading plan, presumably to demonstrate compliance with the provisions of the stormwater ordinance discussed on pages 8 and 9, *infra*.

in 1980 for the first phase of the project, that then consisted of some 155 single family lots, is vested pursuant to the statutory provision. There do not appear to be any other details of the future development that were sufficiently concrete at the time of approval to warrant a finding that they are vested. The County determined that the project is vested from concurrency and consistency with the Comprehensive Plan. Therefore, Land Development Regulations specifically required by the 2010 Comprehensive Plan would not apply to the extent they would negatively impact the project densities and intensities.

Common Law

In addition to the statutory vesting discussion set forth above, there is a question of whether common law equitable estoppel principles may be applicable in this case as well. Under this doctrine, vested rights can be established if the elements of equitable estoppel are met. These elements include the following:

1. Good faith reliance by the property owner,
2. On an act or omission of the government,
3. A substantial change in position or the incurring of extensive obligations and expenses such that it would be inequitable and unjust to destroy the right acquired.

Hollywood Beach Hotel, Co. v. City of Hollywood, 329 So.2d 10 (Fla. 1976).

The developer contends that the common law doctrine of equitable estoppel operates to vest the entire FallsChase property and that the Environmental Management Act and the SDZ, therefore, cannot be applied. (Pelham letter, September 24, 2002.) In support of the argument that equitable estoppel is applicable in this case, a number of "undisputed facts" are set forth as are a number of acts that are purported to be in reliance on action undertaken by Leon County. Based upon our review of the extensive materials contained in the County files, we cannot conclude that the facts are undisputed, nor can we verify the "acts of reliance" or the expenditures that have been suggested by the developer as supporting this claim. As noted previously, the current owner of the property is Lafayette Hills, Inc. The courts have held that a transferee of property has no standing to assert a claim of equitable estoppel unless the transferee can establish some independent act of reliance on promises made by the government. *Equitable Resources, Inc. v. County of Leon*, 643 So.2d 1112, 1118 (Fla. 1st DCA 1994). None of the material that has been submitted addresses the question of whether Lafayette Hills, Inc. claims any acts of reliance. It is difficult to see how such claims could in fact be made given the history of the development.

Another area of significant dispute will be whether it was contemplated at the time that the DRI development order was approved by resolution that further review would be required and that

compliance with ordinances and requirements in existence at the time of that review would be applicable. The "development order" itself does not contain any specific conditions. The ADA refers to the need to comply with various ordinances and regulations, but the language is ambiguous. It is subject to the interpretation that further review of the development would be required and that ordinances and regulations in effect at the time of that review would be applicable. The parties in the course of dealing provide support for this position. The conceptual nature of the development proposal contained in ADA and the apparent position taken by the developer concerning the lack of specificity of the development plan lend support to the position that further review under the then in effect ordinances was contemplated. In addition, when the site plan review and environmental permitting for Unit 1A occurred in 1998, compliance with the Environmental Management Act was achieved. This certainly demonstrates that compliance with the Environmental Management Act can reasonably be achieved. But it also weakens any argument the developer may have that it has been relying, to its detriment, on the original approval and the contention that approval precluded further regulation of any kind on the project. To establish equitable estoppel, it must be shown that there was "good faith" reliance on the government act. *Hollywood Beach Hotel, Co.*, *supra* at pp. 15-16. Based upon the material that has been reviewed the good faith nature of any claimed reliance is in question.

The argument that the County is estopped from applying the Environmental Management Act to the phases of the project other than that which was essentially reviewed and approved as Unit 1A (now Unit 1A and IB) presupposes that the application of this doctrine would be necessary to prevent some type of injustice. In other words, it presupposes that the County or the County staff is attempting to prohibit the developer from completing those portions of the DRI authorized by the development order. As we understand it, the County has suggested that the Environmental Management Act be applied to the project to the extent that the DRI vested density and intensity is not affected. Assuming this is the case, it is not clear what "right" the developer has acquired that would be adversely affected such that equitable estoppel could be established.

It important to note that the County in 1973 had a stormwater ordinance in effect that would certainly apply to the project. Leon County Ord. No. 73-10. That ordinance contains the following provision:

Section 3.0 Responsibility for erosion, sedimentation, runoff and debris control. No person or governmental agency shall change or allow to be changed the contour, topography, use, or vegetative cover of land owned or controlled by him in such a manner that it would cause surface waters flowing from said lands to inundate, erode, deposit sediment on or otherwise damage downstream or downhill property, real or personal, owned by others without their consent, or rivers,

lakes, streams or other water courses without the consent of
the applicable governmental authority.

This ordinance, which clearly would be applicable to the project under the interpretation favored by the developer, appears to provide sufficient authority to address many of the issues that would also be addressed by the Environmental Management Act.

Other County Authority

As a result of the extensive review process that has occurred over the course of the discussions of this project, and particularly the review of various submittals that has occurred over the past several years, concern has arisen on the part of the staff as to the feasibility of the Master Stormwater Concept Plan that has been submitted. These concerns are detailed in a memorandum from Tom Ballentine, P.E., Senior Environmental Engineer, to Gary W. Johnson, Director, Community Planning Development dated June 25, 2002. It is apparent from the memorandum that the development, as currently outlined in the proposals before the County, poses a substantial risk of flooding downstream property owners. Regardless of the validity of the arguments advanced by the developer concerning the vested status of the project, we know of no authority that would require the County to allow the developer to proceed with a project that creates a flood hazard, either on-site or off-site. The developer has not addressed these concerns and until that has been accomplished, we do not believe that the County would be required to approve any further development activities on the site. The existence of this type of "exception" to vesting has been recognized by the DCA and has been discussed, although not applied, by the courts. *See, Huckleberry Land Joint Venture v. State, Department of Community Affairs*, 11 FALR 5706, 5716 (DCA 1989), *Hollywood Beach Hotel Co. v. City of Hollywood*, *supra* at p. 16.

Review of FallsChase Conceptual Master Development Plan

On May 23, 2002, Agents for FallsChase delivered to Leon County a conceptual master plan for buildout of the entire DRI. Staff prepared a detailed environmental analysis of the plan, which is attached hereto as Attachment #1. Staff's analysis was conveyed to the agent by letter dated September 3, 2002. To date, FallsChase has not responded with necessary engineering, hydrologic, or geologic data to support the viability of the conceptual plan. The following specific information must be submitted for the County's environmental staff to further evaluate the proposal:

- 1) Beginning at Upper Lake Lafayette's lake bottom up to an elevation of 51.0 feet NGVD(National Geodetic Vertical Datum), provide NGVD Stage (1 foot increments) vs. Storage Volume Tables for Upper Lake Lafayette for:
 - (a) the existing undeveloped condition with Lafayette Sink unblocked, and

- (b) the post developed condition with fill placed in the Lake for the home sites and stormwater facilities and Lafayette Sink impounded to create a lake with the proposed normal pool elevation.
- 2) Provide a scaled plan view of the proposed post-developed topography of the Lake with the proposed fill placed therein. Indicate on this plan view the locations of cross-sections used in the stage-storage calculations. Also provide the volume calculations to produce the above stage-storage tables.
 - 3) Based on these two stage-storage tables, please explain why, under near flooding or extreme flooding conditions, there will be no adverse changes in the rate, volume or duration of discharge and flooding to areas downstream of Upper Lake Lafayette.

Conclusion

Based upon our review of the project files and the applicable law, we have concluded as follows:

1. Any ordinances or development requirements in effect at the time that the development order was adopted in 1974 are applicable to the project.
2. A persuasive argument can be made that any requirements adopted by Leon County during the period between adoption of the development order and the adoption of the 2010 Comprehensive plan may be applied to the project to the extent that the density and intensity approved in the development order is not affected. This would include the Environmental Management Act, adopted prior to the adoption of the comprehensive plan, and non-substantive amendments to that act that have occurred subsequently.
3. Ordinances adopted after the adoption of the 2010 Comprehensive Plan that are referenced in the plan, including the SDZ, may not be applied to the project to the extent that they materially or substantially affect the developer's ability to complete the development authorized in the development order.
4. Regardless of the outcome of any arguments concerning vesting or the application of equitable estoppel, the concerns raised about the potential flood hazards that may be created by the project must be addressed. The County has authority to require this both under the stormwater ordinance (Ord. No. 73-10) in effect when the development order was approved, and under general principles recognized by the Department of Community Affairs and the courts creating what amounts to an exception to vesting in the case of such safety hazards.

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5. The application of equitable estoppel to the project is far from clear cut. The vagueness of the project outlined in concept in the ADA, the language of the ADA concerning compliance with ordinances; the conduct of the parties and the fact that compliance with the Environmental Management Act was achieved, all support the conclusion that equitable estoppel should not apply in this case. The application of the doctrine is, however, fact specific and as the facts appear to be contested, further proceedings would be required.

OPTIONS:

1. Determine that FallsChase Development of Regional Impact (DRI) is not exempt from the current Leon County Land Development Regulations, in accord with conclusions 1 thru 4 above.
2. Do not determine that FallsChase Development of Regional Impact (DRI) is not vested from the current Leon County Land Development Regulations.
3. Board direction.

RECOMMENDATION:

Board direction.

ATTACHMENTS:

- #1 September 3, 2002, letter from Leon County Environmental Compliance Division to Lee Vause re: FallsChase Master Plan, with attached memorandum.
- #2 July 2, 2002, letter from David Jordan, Deputy General Counsel, Department of Community Affairs, to the County Attorney's Office.
- #3 May 15, 1981, Memorandum from Diana Sawaya-Crane to Mike Garretson.

HT:SHS:sl